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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
UILLB, 3rd Floor  
Washington, D.C. 20536

Public Copy

FILE:

OFFICE:

Texas Service Center

DATE:

FEB - 3 2003

IN RE: Applicant:

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

IN BEHALF OF APPLICANT:

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

INSTRUCTIONS:

Attached is the decision rendered on your appeal. The file has been returned to the Service Center that processed your case.

If your case was sustained, or if your case was remanded for further action, the Service Center will contact you.

IF YOUR APPEAL WAS DISMISSED, YOU NO LONGER HAVE A CASE PENDING BEFORE THIS UNIT, AND YOU ARE NOT ENTITLED TO FILE A MOTION TO REOPEN OR RECONSIDER YOUR CASE.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application for temporary resident status was denied by the Director, Southern Regional Processing Facility, and is now before the Associate Commissioner for Examinations on appeal. The case will be remanded.

The applicant is a native and citizen of Poland. He entered the United States as a J-1 researcher on September 5, 1980, a status which was extended through August 31, 1982. He is seeking permanent resident status under section 245A of the Immigration & Nationality Act (the Act), 8 U.S.C. § 1255a. The applicant also filed an Application for Waiver of Grounds of Excludability, indicating that he was not excludable as a former member of the Communist Party of Poland. The director found that no waiver of excludability was available under section 212(a)(28) of the Act, and found the applicant excludable. The director then denied the application for residence.

Section 212(a)(28) of the Act was repealed and replaced by Section 212(a)(3)(D) of the Act, 8 U.S.C. § 1182(a)(3)(D). That section provides, in pertinent part:

(D) Immigrant membership in totalitarian party.---

(i) In general.--- Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(iii) Exception for past membership.--- Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that---

(I) the membership or affiliation terminated at least---

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party

controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

The applicant's appeal will be adjudicated under section 212(a)(3)(D) of the Act, and not under former section 212(a)(28). If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by the more generous terms. *Matter of George and Lopez-Alvarez*, 11 I&N Dec. 419 (BIA 1965); *Matter of Leveque*, 12 I&N Dec. 633 (BIA 1968).

The record reflects that the applicant became a member of the Communist Party of Poland in the early 1970's, and resigned his party membership in September, 1981. He filed his application for Status as a Temporary Resident on August 31, 1988, seven years later. The record does not reflect that the applicant is a threat to the security of the United States. Thus, the applicant is eligible for the statutory exception for past membership in the Communist Party under section 212(a)(3)(D)(iii) of the Act, and is not inadmissible.

The one ground of ineligibility stated by the director has been overcome. Nevertheless, the director must review the application in its entirety and make a determination as to whether the applicant qualifies in all respects for temporary resident status. Should it be concluded that he does qualify, a new fingerprint check shall be conducted, as the fingerprints have expired.

ORDER: The case is remanded for action and consideration consistent with the above.